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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| CYNTHIA ANDERSON,<br>Plaintiff and Appellant,<br>v.<br>MARK MARCOTTE ET AL.,<br>Defendants and Respondents. | A143746<br><br>(Contra Costa County<br>Super. Ct. No. P09-00097) |

Appellant is Cynthia Anderson. Respondents are Mark Marcotte and Paul Marcotte. Cynthia, Mark, and Paul are siblings, three of the five living children of Albert Marcotte,[1] who is still alive, under a conservatorship. Albert amassed a real estate empire estimated to be in excess of $66 million, much of it in conjunction with Mark and Paul, with whom he worked for over 20 years.

Albert's diminished capacity led to various proceedings concerning his capacity, proceedings that began in late 2008. These proceedings led to more proceedings between and among the family, by our count no fewer than eight. In August 2011, all family members—Albert, his wife, Barbara, and all five siblings—entered into a comprehensive, 30-page settlement agreement approved by the Contra Costa County Superior Court. The settlement agreement contained release language and provided for dismissals of pending matters. The agreement also carved out from the settlement eight categories of claims that might be further pursued.

[1] As is usual in family disputes, we refer to the parties by their first names.

Seven months after the settlement, Cynthia filed a petition in the conservatorship proceeding, the petition leading to the appeal here. The appeal is from a judgment dismissing Cynthia's second amended petition, entered after the trial court sustained without leave to amend the demurrers to all 14 causes of action in that petition—an amended petition that added nine new causes of action to the five alleged in the first amended petition. Cynthia's appeal contests the demurrers as to only six of the causes of action, demurrers the trial court sustained on several grounds, including lack of standing, failure to state a claim, and statute of limitations. Our de novo review leads to the conclusion that the trial court was right, and we affirm.

## BACKGROUND

### The Family and the Trust

Albert is 90 years old. He and his first wife had six children, five of whom are still alive: Cynthia, Mark, Paul, Robin Renshaw, and Gina Stearley. Albert is currently married to Barbara Marcotte, whom he married in 1998.

Albert owned and operated a successful real estate business, developed over the years by either building or purchasing multi-family apartment buildings. Since at least 1982, Mark and Paul worked with Albert in the business.

In 1991, Albert established the Albert R. Marcotte Family Trust of 1991 (the trust), an instrument prepared by Albert's longtime attorney, Anthony Varni. Albert was the trustee. The trust was amended six times, most recently in late 2008, which last amendment was prepared by a different attorney, Robert Sommers, and was favorable to Cynthia. The last amendment also generated proceedings between siblings, and ultimately led to an agreement in the settlement that the sixth amendment would be "neither deemed invalid nor approved."

As significant to the litigation here, the trust provides that upon Albert's death the property he owns jointly with either Mark or Paul will devise to them. The remainder of Albert's property is to be distributed in two-ninths shares to Cynthia, Mark, Paul, and Robin, and one-ninth to Gina.

**The Business and the Transactions in Issue**

As indicated, Albert amassed what was referred to as a real estate "empire," estimated to be $66 million. As Cynthia herself alleges, the bulk of Albert's property is held in a limited partnership: Marcotte Dry Creek Limited Partnership (Dry Creek). Dry Creek is owned 99 percent by the trust, and one percent by Marcotte Dry Creek Properties, LLC (Dry Creek LLC), the general partner.

Whatever the extent of Albert's property, the dispute here focuses on three specific transactions:

(1) In 1998, in connection with Mark's divorce proceeding, Albert lent Mark $350,000, a loan memorialized in a promissory note. The loan was modified in 2006, reducing the outstanding balance, with a July 2007 due date. This is referred to by the parties as "the divorce loan."

(2) In 2003, Albert, Mark, and Paul formed a partnership called Deer Creek LLP (Deer Creek), formed to build and operate a large apartment complex in Antioch eventually known as the Bella Rose Apartments. Deer Creek was capitalized by Mark and Paul contributing real property, and Albert $4.1 million in cash. They were equal one-third partners. In 2004, Albert transferred his share of Deer Creek to the trust.

(3) In November 2005, Dry Creek refinanced its apartment complex for approximately $18 million, paying off the existing $9 million security obligation and incurring a $1 million defeasance. Dry Creek transferred some $8 million to Deer Creek to fund the construction of the Bella Rose apartments. This is referred to by the parties as "the Deer Creek loan."

**The Family Meeting**

Attorney Varni called a family meeting, which was held in his office on August 1, 2008. Thirteen people were in attendance: Albert; Barbara; Cynthia; Paul and his wife; Mark; Robin; Gina; Joseph Kitts, accountant for Albert, Barbara, Paul, and Mark; Magany Abbass, attorney for Cynthia; Harvey Payne, attorney for Robin; and Mr. Varni and his legal assistant. The meeting lasted two hours, and following it Mr. Varni prepared a four-page memorandum of what was discussed, which as pertinent here

described specific discussion of the 2005 refinance of Dry Creek, and the transfer of funds from Dry Creek to Deer Creek.

A week later, on August 8, Mr. Varni provided the Dry Creek Partnership Agreement to all of Albert's children.

On September 4, a second family meeting was held in Mr. Varni's office. This one lasted three hours.

On October 17, at Mr. Varni's request, Kitts, the accountant, sent Cynthia a set of documents entitled "Dry Creek Loan Proceeds Recap," which further identified the transfer from Dry Creek to Deer Creek, and attached bank statements evidencing the transfer.

**The Sixth Amendment to the Trust—and the Litigation**

On November 18, 2008, Albert executed the sixth amendment to the trust, along with other documents, all of which were prepared by a new attorney, Robert Sommers. The sixth amendment appointed Cynthia as trustee. The other documents appointed Cynthia manager of Dry Creek LLC, changed its management structure, and modified various other business agreements.

Following execution of the sixth amendment, as Cynthia describes it, "On January 16, 2009, acting under the authority granted her by the Sixth Amendment to the Trust and other documents Albert executed . . . , Cynthia took control of the Marcotte Properties business entities, ousting Paul and Mark from the business premises."

Meanwhile, the legal proceedings started, begun by Paul, followed quickly by Cynthia.

On November 29, 2008, Paul filed a petition in Contra Costa County probate court: *In re the Albert R. Marcotte Trust of 1991*, case No. P08-1465 (the trust action). Paul's petition sought to remove Albert as trustee on the ground of mental incapacity and to void the sixth amendment.

On January 22, 2009, Paul filed a petition in the Contra Costa County for appointment of temporary conservator: *Conservatorship of the Estate of Albert R.*

*Marcotte*, case No. P09-00097 (the conservatorship proceeding). Letters were issued that same day, and Cynthia filed her first lawsuit the next.

On January 23, 2009, Cynthia filed a lawsuit in Alameda County Superior Court: *Marcotte Dry Creek Properties, LLC v. Mark K. Marcotte and Paul Marcotte et al.* (the Alameda action). The Alameda action was filed in the name of Dry Creek LLC, an asset owned by Albert, and therefore in his trust, and two-ninths of which would thus pass to Cynthia on Albert's death. It alleged among other things that Mark and Paul had improperly transferred "in excess of $7,900,000.00" from Dry Creek to Deer Creek.

On March 12, 2009, Cynthia filed her own petition in the trust action, a petition styled as one to "confirm validity of sixth amendment of trust appointing her as sole trustee or, if sixth amendment found invalid, for removal of Paul Marcotte and Mark Marcotte as co-trustees and immediate appointment of temporary trustee." Cynthia's petition sought a determination that Albert had capacity to execute the sixth amendment to the trust and the business change documents, alleging that those documents were valid documents governing the administration of the trust and management of the businesses.

On March 4, 2009, Cynthia filed in Alameda County a petition for appointment of a receiver, case No. HG09-4324790.

On March 30, Cynthia filed a petition in the conservatorship proceeding seeking her appointment as conservator of the estate, and Barbara as conservator of the person.[2]

[2] In addition to filing her own petition in the conservatorship proceeding, Cynthia also opposed Paul's petition. Cynthia's opposition included as an exhibit a letter from Mr. Varni, who wrote, "Despite Paul's and Mark's thoughts to the contrary, their father still has the ability to understand and to feel the impact of his two sons turning against him and seeking to have him found to be incompetent. I believe he would be willing to lose all of his assets before he would allow the Court to determine he has lost his mental capacity."

On May 4, 2009, the probate court appointed Barbara temporary conservator of Albert's person and Paul temporary conservator of the estate.[3]

**The Settlement**

In August 2011, the members of the Marcotte family entered into a settlement, signing an agreement that was comprehensive indeed. The agreement was 30 pages long and, according to a representation by counsel, had been the subject of six months of negotiation. The agreement was signed by Albert, acting through his guardian ad litem; Barbara; all five of Albert's children; and also by their attorneys. On the final page of the settlement was this entry: "Reviewed and approved and ordered. 8/22/11. Charles B. Burch, Superior Court Judge."

The agreement expressly provided that litigation would be dismissed with prejudice. Section 1 of the agreement provided in seven detailed paragraphs that the parties were releasing one another. Finally, and as pertinent here, the settlement agreement provided that eight specific claims would be excluded from any release.[4]

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[3] Two more cases quickly followed:

On June 11, 2009, the Marcotte Properties business entities, now under Mark's management, filed suit in Alameda County Superior Court, against Cynthia, her husband, and Barbara, case No. VG-09-457235.

On June 24, 2009, acting individually and as co-trustee of the trust, Mark filed suit in Contra Costa County against Cynthia, Barbara, Cynthia's attorney Abbass, and Albert's new attorney Sommers, case No. C09-01614. The action alleged elder abuse.

[4] As pertinent to the three transactions in issue here, the settlement agreement provided as follows:

"Notwithstanding the above, the Parties do not intend to release any claims any of the Parties may have related to issues relevant to 'Phase II' of this litigation. 'Phase II' includes the allegations, loans and issues listed in subsections a. through h. below.

"a. Any claims regarding the financial management of Marcotte Development Company by Paul Marcotte, Mark Marcotte or Cynthia Anderson that are unknown to the Parties at the time this Settlement Agreement is executed.

"b. Any sum of money improperly transferred by Paul Marcotte and/or Mark Marcotte from the Deer Creek Partnership to themselves. [¶] . . . [¶]

Seven months later, Cynthia filed the petition pertinent here.

**The Petition**

On April 10, 2012, Cynthia filed a petition in the conservatorship proceeding, naming three defendants: Mark, Paul, and Kitts, the accountant. The petition alleged seven causes of action: (1) breach of contract against Mark and Paul, for the claimed failure to repay the Deer Creek loan; (2) breach of contract against Mark, for the claimed failure to repay the divorce loan; (3) breach of fiduciary duty against Mark and Paul; (4) fraud; (5) breach of fiduciary duty; (6) negligence, against Kitts; and (7) conversion, against Mark and Paul.

Mark and Paul each filed demurrers.[5] Before the demurrers were heard, Cynthia filed a first amended petition (FAP) against Mark and Paul. It alleged five causes of action: (1) breach of contract; (2) breach of contract; (3) breach of fiduciary duty; (4) fraud; and (5) conversion. Four of the five causes of action were against both Mark and Paul; the second was against Mark alone, based on the divorce loan.

The FAP was different in some respects from the original petition. For example, as to the nonpayment of the Deer Creek loan, Cynthia alleged that the loan—rounded up from $7.9 million to $9 million—was "memorialized in writing" though no writing was attached to the FAP. And Cynthia alleged that no payments of principal or interest had been made on the loan, specifically alleging that "By August 1, 2008 . . . Mark directed that the interest payments cease on or about that date." In sum, Cynthia alleged that the

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"d. Any claim by any Party related to funds transferred from Dry Creek LP to Deer Creek Partnership including disputes as to the character of those funds as a loan or a gift and any claims or disputes related to contributions to the Deer Creek Partnership and/or ownership interests of said Partnership. [¶] . . . [¶]

"g. Any claim by Albert Marcotte related to unauthorized transfers of funds from Marcotte Development Company to Paul Marcotte and Mark Marcotte and any claims by Paul Marcotte and Mark Marcotte that funds properly belonging to them were improperly paid to or attributed to Albert Marcotte.

"h. Mark Marcotte's obligation to repay monies loaned to him by Albert Marcotte in relation to Mark Marcotte's prior divorce settlement."

[5] Cynthia entered into a tolling agreement with Kitts.

failure to make loan payments as of August 1, 2008 constituted a breach of a written loan agreement.

The FAP also alleged that Deer Creek was obligated to repay the loan to Albert, not Dry Creek, since "Albert was, in actuality, the lender of the Deer Creek Loan." This, too, was in contradiction to her previous allegation that the loan was from Dry Creek.

In December, 2012, Mark and Paul filed separate demurrers to the FAP. Cynthia filed opposition, and Mark and Paul replies. The demurrers were thus fully briefed. This was in January 2013. They did not come on for hearing for some fifteen months,[6] until April 15, 2014.

The demurrers came on for hearing before the Honorable Susanne Fenstermacher, by our count the eighth Contra Costa County judge involved in the conservatorship proceeding. The hearing was lengthy, in the course of which Judge Fenstermacher demonstrated a thorough knowledge of the matter, carefully analyzing each of the five causes of action, and one-by-one ruling that the demurrer to each of them would be sustained, with leave to amend. Doing so, Judge Fenstermacher observed that in addition to whatever other defects might be present in the FAP, four of the five causes of action (all but conversion) appeared to be "time barred." Judge Fenstermacher thereafter entered an order sustaining the demurrers with leave to amend.

On June 13, 2014, Cynthia filed her second amended petition (SAP)—and quite a petition it was. The SAP named Mark, Paul, and Kitts, and alleged 14 causes of action, most of which, of course, were alleged for the first time. The SAP had 213 paragraphs, and had appended to it 15 exhibits, totaling another 185 pages. The exhibits included such things as transcripts of depositions, redacted pleadings filed by nonparties, and Mr. Varni's memorandum from the family meeting on August 1, 2008. The SAP alleged

[6] Mark represents that "The 15-month delay was caused by Robin . . ., who struck the judge presiding over the case, and filed three Probate Code §850 Petitions seeking relief nearly identical to the relief sought by [Cynthia], . . . which was joined by [Cynthia]. Mark demurred to [Robin's] Second Amended Petition, and his demurrer was sustained without leave to amend on standing and statute of limitations grounds." No party takes issue with Mark's representation.

these 14 causes of action: (1) rescission of the settlement agreement; (2), (3) and (4), breach of contract, the fourth cause of action adding a new claimed breach; (5) and (6), breach of fiduciary duty; (7) fraud; (8) professional negligence; (9) conversion; (10) financial elder abuse I; (11) financial elder abuse II; (12) relief pursuant to Probate Code sections 850 and 859; (13) civil conspiracy; and (14) unjust enrichment. Nine of the 14 causes of action were against both Mark and Paul. The only exceptions were the fourth and eleventh, alleged against Mark alone; the sixth and eighth, alleged only against Kitts; and the thirteenth, alleged against Mark, Paul, and Kitts.

Again Mark and Paul filed demurrers. The demurrers were based on several grounds, including statutes of limitations, failure to plead written or oral contract, and lack of standing. Paul also moved to strike certain parts of the pleading on res judicata grounds. Finally, Paul requested judicial notice of 25 documents, including Cynthia's prior pleadings and declarations in the multiple lawsuits.

Cynthia filed oppositions, oppositions that included her own request for judicial notice.

Mark and Paul filed replies, and the demurrers came on for hearing on August 13, 2014, again before Judge Fenstermacher. Judge Fenstermacher heard extensive argument, in the course of which she went over in detail her tentative ruling, which was to sustain the demurrers without leave to amend.

On August 14, Cynthia filed a "Request for Leave to Amend Second Amended Petition."

On October 9, 2014, Judge Fenstermacher filed two orders sustaining the demurrers without leave to amend. The orders were thorough indeed, analyzing the SAP cause of action by cause of action. We need not detail all of Judge Fenstermacher's analysis here, since we review the matter de novo. Suffice to say that Judge Fenstermacher concluded that each and every cause of action failed for more than one reason, including that five of the six causes of action challenged by Cynthia on appeal (all but the eleventh) failed because they were time-barred.

Judgment was thereafter entered in favor of Mark and Paul. Cynthia dismissed the SAP against Kitts, and then appealed.

## DISCUSSION

### Introduction to the Analysis

As noted, Cynthia appeals a judgment entered after the trial court sustained without leave to amend a demurrer to all 14 causes of action in her SAP, although she contests only six of them. So, our standard of review would appear to be well settled, to look at the four corners of the SAP. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

But Cynthia's SAP is hardly a run-of-the-mill pleading, including as it did 15 exhibits totaling 185 pages. Beyond that, Paul's demurrer included a request for judicial notice of 25 more documents, 440 pages in all. And Cynthia's opposition requested notice of three more documents, 66 more pages. So, there is much before us beyond the four corners of the SAP. And as we have said, "allegations in a complaint must yield to contrary allegations contained in exhibits to a complaint." (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 (*Beck*).)

Beyond that, Cynthia's SAP—and, indeed, some of her arguments here—rely on claimed facts that are contrary to facts she had earlier asserted. Mark and Paul call Cynthia on this, and in part rely on the sham pleading doctrine, which we also discussed in *Beck, supra,* 24 Cal.App.4th at p. 946: " 'Generally, after an amended pleading has been filed, courts will disregard the original pleading. [Citation.] [¶] However, an exception to this rule is . . . where an amended complaint attempts to avoid defects set forth in a prior complaint by ignoring them. The court may examine the prior complaint to ascertain whether the amended complaint is merely a sham.' [Citation.] The rationale for this rule is obvious. 'A pleader may not attempt to breathe life into a complaint by omitting relevant facts which made his previous complaint defective.' [Citation.] Moreover, any inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent allegations. [Citation.] Accordingly, a court is 'not bound to accept as true allegations contrary to factual allegations in former pleading in the same case.' [Citation.]" (*See* also *Reichert. v. General Ins. Co.* (1968)

68 Cal.2d 822, 836–837; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1190, pp. 621–622.)

In essence, under the "sham pleading" doctrine the court takes judicial notice of the prior pleadings and requires the pleader to adequately explain the inconsistency. If the pleader fails to do so, the court disregards the inconsistent allegations and reads into the amended complaint the allegations of the superseded complaint. (*Chavez v. Times-Mirror Co.* (1921) 185 Cal. 20, 23 [complaint should be read as containing the judicially noticeable facts; "even when the pleading contains an express allegation to the contrary"]; *Hendy v. Losse* (1991) 54 Cal.3d 723, 742–743 [affirming order sustaining demurrer without leave to amend when amended complaint omitted harmful allegations from the original complaint]; *City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1719 [judicially noticeable facts supersede inconsistent factual allegations contained in later complaint].)

We agree that in many respects some of Cynthia's allegations in her SAP, and some of her positions here, are contrary to and/or contradicted by her earlier positions, a few of which will be set forth in connection with the discussion of the issue to which they pertain. But perhaps most troubling is Cynthia's position vis-à-vis the Deer Creek loan, which, assuming for purposes of discussion that a loan it was, had no promissory note or other document memorializing it, making it subject to the two-year limitation provision for oral contracts. (Code Civ. Proc., § 339, subd. (1).)

Cynthia alleged below that "Mark and Paul initially claimed that the Deer Creek Loan did not have to be repaid." Cynthia's other verified allegations include that "Mark and Paul have failed and refused . . . to pay the [loan]," and "[Deer Creek] has not made payments on the [loan] since 2008." Cynthia's allegations of Mark's and Paul's repudiation of the loan are also consistent with her allegations that "the [loan] is currently due and payable."

These allegations are troublingly dissonant with her arguments on appeal, where she asserts that "payments have been missed, but the entire loan has not yet matured"; or that the loan is "an executory contract" that "calls for installment payments"; or, based on

Mark's and Paul's claimed testimony, that "the loan is not due until 2022."[7] Not only did Cynthia possess these claimed facts when she filed her petition in 2012, her claim on appeal is in stark contrast to her verified allegations in earlier proceedings where she sought recovery of the entire loan amount.

In short, Cynthia claimed in verified pleadings that the Deer Creek loan was due and payable in full, a claimed version of the facts she doggedly pursued for years in at least three proceedings. Now, she claims that the loan does not mature until 2022 and that accrual of the statute of limitations has yet to commence. This cannot be allowed. (See *Kenworthy v. Brown* (1967) 248 Cal.App.2d 298, 302 [original complaint disclosed in its allegations that the claim was barred by the statute of limitations; demurrer sustained with leave to amend; plaintiff filed a complaint omitting, without explanation, all dates; Court of Appeal held that the original allegations will be "read into" the

[7] Mark goes so far as to accuse Cynthia of out and out misrepresenting his testimony, citing, for example, Cynthia's brief where, quoting six lines in a deposition, Cynthia asserts that "Mark, despite maintaining [Deer Creek] is not a loan that he must repay, nevertheless acknowledged the 2022 due date." Mark's respondent's brief calls Cynthia on this, asserting that she "has intentionally and deliberately mischaracterized both the law and the facts in this case so that her causes of action seem reasonable. In one prominent example, in citing to and quoting Mark Marcotte's deposition, [Cynthia] states in her brief that Mark 'acknowledged' the Dry Creek-Deer Creek Transfer as a loan not due until 2022. [Cynthia] made this same allegation in her Second Amended Petition. [Cynthia] starts the excerpt of the deposition, consisting of nine pages of transcript, which drops the reader into the middle of a line of questioning, of which the third line of testimony is the 'acknowledgment' she relies so heavily on. [¶] This truncation is a false representation of the testimony of Mark Marcotte and was a deliberate attempt to mislead the Trial Court, and now the Appellate Court. A more complete excerpt—allowing for a correct contextual reading—of the transcript demonstrates that the loan which Mark testifies is due in 2022, and to which [Cynthia] relies, is the loan from a bank, not the transfer from Dry Creek to Deer Creek. . . . In fact, [Mark] makes clear that the loan is through a bank, not from Dry Creek."

All Cynthia's reply brief says is this: "Mark disputes that he ever acknowledged the loan, asserting that Cynthia has intentionally misreported his deposition testimony. It may be that Cynthia misunderstood Mark's testimony, but it was not intentionally misrepresented, as Mark asserts."

amended complaint, rendering it subject to demurrer on the same ground as the original complaint].)

**Summary of Cynthia's Position—and Her Arguments**

As indicated, Cynthia attacks the rulings on only six of the 14 causes of action in her SAP: the second, twelfth, and fourteenth, seeking recovery on the Deer Creek loan; the tenth and eleventh, for elder abuse; and the thirteenth, for conspiracy. That part of her position is easy to discern.

What is not so easy to discern, however, is the precise argument(s) she makes. Specifically: Cynthia's opening brief is 69 pages long, just over 12,000 words. Following recitation of the facts and proceedings below, the brief lists five "Questions Presented." Then, following brief statements of what Cynthia claims are the standards of review, she proceeds to her arguments. Those arguments are four in number, two of which have subparts and one of which has three subparts. Cynthia's reply brief has six arguments, three of which have subparts, three of which themselves have more sub-subparts. They are difficult briefs to comprehend. And we hasten to add, none of the arguments is framed to meaningfully address any of the five questions presented.

Against that background, we turn to the arguments as best we understand them, which in our view are nine in number.

**The Settlement Agreement Does Not Save Cynthia's Claims**

Three of Cynthia's arguments refer to the settlement agreement. The arguments are that: it was error to look to the settlement agreement without introduction of extrinsic evidence; "the Agreement reflects the parties' intent to preserve the . . . claims"; and the agreement "satisfied California's" requirement for the "statute of limitations waiver."

As to the first claim, we do not understand that Judge Fenstermacher interpreted the settlement agreement in any way.

As to the second claim, it is true that the settlement agreement carved out certain claims. But the agreement made absolutely no mention as to when those claims had to be brought, and certainly no mention of any waiver of any defenses to the carved out claims. Moreover, one would have to ask Cynthia, how long after the settlement agreement

would she have had to bring a claim? Two years? Four years? Infinity? Further, one would ask, were other defenses waived by the mere execution of the settlement agreement, defenses such as statute of frauds, or res judicata, or lack of standing? In short, while the carved out claims remained, so too did any defenses to those claims.

Cynthia's last argument is that the settlement agreement satisfies Code of Civil Procedure section 360.5, which provides in pertinent part as follows: "No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated. . . ." Cynthia cites no case dealing with section 360.5[8] Regardless, we reject the argument, as there is no reference in the settlement agreement to the statute of limitations at all, let alone the required written waiver of it.

**Estoppel Does Not Apply**

Cynthia's next two arguments rely on estoppel. The first estoppel argument contends Paul and Mark should be estopped "from denying the Settlement Agreement preserved the Phase II claims." The second contends that estoppel prevents application of a two-year limitation provision because the absence of a writing for the Deer Creek loan was due to Mark's and Paul's failure to prepare the promissory note for the Deer Creek loan, which breached the partnership agreement.

Cynthia's first estoppel argument asserts that the settlement agreement should operate "not just as an estoppel to assert the statute of limitations . . . but also as an [equitable] estoppel [generally] to preclude Mark and Paul from asserting the Phase II claims were not preserved in the Settlement Agreement after promising they were."

The elements of equitable estoppel are five: (1) defendant to be estopped knew the facts; (2) defendant made a misrepresentation by words or conduct bearing on the necessity of bringing a timely suit; (3) defendant intended that his words or conduct would be acted upon, or led plaintiff to believe that it was so intended; (4) plaintiff was

[8] The one case Cynthia cites, *Sterling v. Taylor* (2007) 40 Cal.4th 757, deals with the statute of frauds. It has nothing to do with a statute of limitations.

ignorant of the true state of the facts; and (5) plaintiff reasonably relied thereon in delaying commencement of the action. (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496; *Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) Cynthia fails to demonstrate how she can meet these elements.

The second estoppel argument—apparently made for the first time anywhere—asserts that the Deer Creek partnership agreement requires loans from a partner "be evidenced by a promissory note delivered to the lending Partner and executed in the name of the Partnership by all Partners." And the argument runs, "Paul and Mark should not be permitted to take advantage of the *absence* of a writing *they were required to prepare and deliver* to avoid liability failing to repay the loan. Specifically, they should be estopped to assert the loan contract was an oral agreement to which the two year, rather than the four year, statute of limitations applies." The argument fails, for several reasons.

To begin with, the argument was not made below. It has no place here. (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1519; *Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251.)

Second, the argument is directly contradicted by Cynthia's exhibits to the SAP, which include the fact that in December 2005, Mr. Varni, Albert's attorney, advised accountant Kitts that if any money was intended to be repaid, such should be documented *by Kitts*.

Third, Cynthia's claim based on a breach of the Deer Creek partnership agreement is unfounded. Section 7(e) cited by Cynthia expressly applies only to loans made to Deer Creek *by* a Deer Creek partner. It does not apply to loans made to Deer Creek by an altogether different person or entity, such as under the facts Cynthia relies on here. In sum, the Deer Creek partnership agreement has no applicability to any loan Deer Creek

might obtain from Dry Creek, which loan would be governed by Dry Creek's partnership agreement.[9]

Last, equitable estoppel requires Cynthia to show she was wrongfully induced to forebear from bringing suit. (*McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, 140–142.) How a 2005 breach of the Deer Creek partnership agreement, if any, wrongfully induced Cynthia to forebear from bringing suit within the limitations period is hard to comprehend.

**Equitable Tolling Does Not Apply**

Cynthia's next argument is that equitable tolling requires extension of the statute of limitation since "Paul and Mark would have had to sue themselves" to satisfy the statute. And in the next argument, under the heading that "not every cause of action . . . was time barred," Cynthia argues that any statute was "tolled while Albert lacked capacity." Neither argument has merit—and the second argument is, frankly, astonishing.

"The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.] Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99.)

"[T]he effect of equitable tolling is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time

[9] Cynthia cannot escape her own recognition of Dry Creek LLC as a separate legal entity: she initiated suit on behalf of Dry Creek LLC's general partner to recover exactly $7.9 million in her Alameda County case, and expressly pleaded that Mark and Paul owe Dry Creek—not Albert—the money.

during which the tolling event previously occurred." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371.) And the doctrine is as "the name suggests . . . an equitable issue for court resolution." (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745.)

"Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citations.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason. [Citation.]" (*McDonald, v. Antelope Valley Community College Dist., supra,* 45 Cal.4th at p. 100; accord, *Lantzy v. Centex Homes, supra,* 31 Cal.4th at p. 370.) As a result, as a leading practical treatise synthesizes it, equitable tolling is recognized in four situations: (1) while the plaintiff is pursuing an alternative remedy in another forum; (2) in certain actions against an insurer; (3) under "narrow circumstances" while plaintiff is pursuing the same remedy in the same forum after an erroneous dismissal; and (4) while the defendant is fraudulently concealing the cause of action. (Rylaarsdam et al., Cal. Practice Guide: Civil Procedure Before Trial, Statutes of Limitations (The Rutter Group 2016) § 6.5, p. 6-1.)

The first three alternatives are certainly not present here, leaving Cynthia to attempt to rely on the last—though that she is doing so is not clear from her brief. Cynthia describes her first basis for equitable tolling this way: "commencing in 2003 and continuing until January 22, 2009, Paul and Mark—one or both—were in continuous and on-going breach of duties they owed to Albert. At least until August 2008, they concealed information disclosing a cause of action against them as Albert's employees, agents, debtors and partners, as well as against the Deer Creek Partnership." And the argument continues, they would have had to sue themselves "until Cynthia became a permanent Co-Trustee" of the trust pursuant to the settlement.

To begin with, Cynthia does not identify specifically which of her causes of action might be equitably tolled.[10] Nor does she specify which "duties" were breached by Mark and Paul in a "continuous and on-going" manner, or the specific limitations periods applicable to any of them.

Beyond that, Cynthia has not demonstrated fraudulent concealment. To establish equitable tolling by reason of fraudulent concealment, Cynthia must allege (1) fraudulent conduct by defendants resulting in concealment of the operative facts that are the basis(es) of the cause(s) of action; (2) her failure to discover the operative facts; and (3) due diligence by her until discovery of those facts. (*Sagehorn v. Engle* (2006) 141 Cal.App.4th 452, 460–461.) Such allegations are not present here.

To the contrary, Cynthia found out about the money loan from Dry Creek at the 2008 family meeting, learned that there was no writing dealing with it, and learned that Deer Creek, Mark, and Paul failed or refused to repay the money. Moreover, Cynthia attached to her pleading in the 2009 lawsuit an accounting of the Deer Creek capital contributions. So, according to her own admissions, Cynthia possessed the operative facts more than three years, two months before filing her petition in April 2012.

Having failed to satisfy any of the four established bases for equitable tolling, Cynthia apparently proposes a novel basis for equitable tolling, one that has received no judicial recognition. That is, Cynthia points out that Paul became temporary conservator of Albert's estate on January 22, 2009 and that Mark and Paul were appointed temporary co-trustees of the trust on May 4, 2009. Based on this, Cynthia asserts that "[t]he statute of limitations must be suspended under such circumstances until there is someone else who can exercise the power to remedy the wrongs committed." She identifies August 26,

[10] Cynthia does perhaps provide a reference, however oblique it may be, to the causes of action by her string citation to the 60 paragraphs in the SAP, which cite to paragraphs from her second, third, fifth, seventh, ninth, tenth, and twelfth causes of action. The problem with that is that Cynthia is not asserting error with four of those seven causes of action.

2011—the effective date in the settlement agreement—as the date when tolling ceased. Such assertions do not support equitable tolling.

Cynthia's assertions are also misplaced, as the court appointments Cynthia relies on presented no legal impediment to the pursuit of any claims belonging to Dry Creek or Albert. To the contrary, Cynthia had at least three options she could have pursued, to petition the probate court: (1) to compel the trustee as Dry Creek's general partner to sue to recover the loan (Prob. Code, §§ 2359, 17200); or (2) to appoint a trustee ad litem to pursue Dry Creek's claims against Deer Creek when the trust was Dry Creek's general partner (*Getty v. Getty* (1988) 205 Cal.App.3d 134, 142; Prob. Code, § 16249); or (3) to compel Albert's conservator or the trustee, as Dry Creek's limited partner, to pursue a derivative action against Dry Creek for recovery of the loan to Deer Creek. (Prob. Code, §§ 2359, 17200.) Cynthia's first basis for equitable tolling fails.

Cynthia's second basis for tolling, Albert's lack of capacity, deserves some discussion. This argument relies on Code of Civil Procedure section 352, subdivision (a),[11] and asserts that Albert lacked capacity, and apparently had since 2004 when he was first diagnosed with some form of dementia.

As discussed above, Cynthia sought—vigorously—to have the probate court uphold the sixth amendment to the trust, along with other documents giving her more power and control, all of which documents were executed by Albert in November 2008. In other words, Cynthia claimed, usually under penalty of perjury, that Albert was competent, and, she argued, was cognizant of the claimed wrongs against him. And she claimed it was for that reason that he executed the documents favorable to Cynthia: to appoint her as manager of Dry Creek LLC, change its management structure, and appoint her as trustee. Cynthia alleged that Albert knew exactly who had supposedly wronged him, and why he wanted Cynthia to remove Mark and Paul and place her exclusively in

[11] This section provides as follows: "(a) If a person entitled to bring an action . . . is, at the time of the cause of action accrued either under the age of majority or lacking the legal capacity to make decisions, the time of the disability is not part of the time limited for the commencement of the action."

charge, a fundamental position asserting Albert's competency she made in no fewer than four pleadings. Cynthia also took this position in declarations, and also when she joined in Robin's petition making similar allegations. Beyond all that, in 2009, Cynthia went with Albert to the bank to withdraw $414,000 from the Deer Creek account, at which time she was made a signatory on the account.[12]

**The Demurrers to the Elder Abuse Claims Were Properly Sustained Without Leave to Amend**

Cynthia's penultimate argument is that Judge Fenstermacher erred in sustaining the demurrers to the tenth and eleventh causes of action, the elder abuse clams, without leave to amend. By no means.

Cynthia describes her elder abuse claims this way: "The SAP's Tenth and Eleventh Causes of Action seek recovery for financial elder abuse under Welfare and Institutions Code §15600 et seq. resulting from a course of conduct extending over years, including Paul and Mark mischaracterizing Albert's contribution to the Deer Creek Partnership in 2003; convincing Albert to transfer legal title to Dry Creek incident to the Deer Creek loan, refinance Dry Creek and transfer $8 million of equity to Deer Creek in late 2005; taking improper gifts commencing in 2006; refusing to pay interest on the $8 million Deer Creek Loan and hiding their intention not to pay from Albert, as well as Barbara and their sisters who could have alerted him; and denying any obligation to repay that loan in the summer of 2008." So, all asserted abuses occurred between 2003 and 2008.[13]

[12] Notwithstanding all that, Cynthia alleged in paragraph 41 of the SAP that "Albert lacked the ability [to] comprehend the effects and consequences of the Refinance Loan or the Deer Creek Loan" that occurred in 2005. Incredibly, in the very same document, in paragraphs 66 and 67, Cynthia alleged that in November 2008 Albert had the mental capacity to remove Mark and Paul from the management of the business and insert Cynthia in their place.

[13] Cynthia's reply brief refers to yet another act, Paul's 2009 request to be appointed conservator, and states that this "was arguably the final step in Paul['s] and Mark's wrongdoing."

Judge Fenstermacher held that the 10th cause of action was time-barred by Welfare and Institutions Code section 15657.7, requiring an action for financial elder abuse to be brought "within four years after the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse." And Judge Fenstermacher concluded, the statute "began to run [on this cause of action] when [petitioner] filed her complaint in Alameda County in January 2009." As to the 11th cause of action, based on the divorce loan, Judge Fenstermacher held that it was nothing more than a contract claim, not elder abuse.

Ignoring Judge Fenstermacher's ruling as to the 11th cause of action, and accepting as accurate Judge Fenstermacher's statement that the cause of action accrued with Cynthia's January 2009 case in Alameda County, Cynthia claims, citing nothing, that the elder abuse claims were timely "because the original petition was filed on April 10, 2012, less than four years later." Cynthia is wrong—the original petition is not controlling.

As shown above, Cynthia's original petition had seven causes of action, none of which was for elder abuse. The two elder abuse causes of action were added in the SAP, filed on June 13, 2014. That is the critical date, not the original petition. The issue is whether the inclusion of new causes of action in the amended pleading will relate back to the original pleading. While the law on that issue has certainly liberalized (see *Austin v. Massachusetts Bonding & Ins. Co.* (1961) 56 Cal.2d 596, 601), an amended pleading will not automatically relate back. (See generally *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1278–1279.) Rather, as the Supreme Court analyzed it many years ago, the test is "whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation," noting that a defendant should "not be required to answer a wholly different legal liability or obligation from that originally stated." (*Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 20.) As the leading practical treatise describes it in the analogous context of adding a new party, "a new plaintiff *cannot* be joined after the statute of limitations has run where he or she seeks to enforce

an *independent right* or to impose greater liability upon the defendant." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶6:755, p. 6-199.)

This is certainly the case here, given what need be proven in an elder abuse case. (See generally CACI No. 3100 [setting forth the essential elements of financial abuse; Welfare and Institutions Code § 15610.30].) And assuming those elements could be proven, the extent of the liability to which defendants could be subject is substantially greater, including for treble damages and more. In sum, in the newly added elder abuse claims, defendants would be required to "answer a wholly different legal liability or obligation from that originally stated." (*Klopstock v. Superior Court*, *supra*, 17 Cal.2d at p. 20.) Since they would, the elder abuse claims do not relate back to the original petition.

**No Error in Denying Leave to Amend the Conspiracy Cause of Action**

Cynthia's last argument is that Judge Fenstermacher erred in denying leave to amend the conspiracy cause of action. Judge Fenstermacher sustained the demurrer to this cause of action as follows: "The petition alleges that Mark acted in concert with others characterizing the $4.1 million from Albert as a capital contribution not a loan and that they characterized as a capital contribution the funds from the Dry Creek refinance, some of which were transferred to the Dry Creek Partnership. However Petitioner made no allegations that such characterization constituted a wrongful act or caused damages as set forth in the Petition. If the underlying cause of action is fraud, it would be time-barred, based upon the knowledge gained by Petitioner at the Family Meeting on August 1, 2008."

Cynthia asserts, however inaccurately, that conspiracy "cannot be logically subject to any statute of limitations." That is not correct. The statute of limitations for conspiracy is two years. (Code Civ. Proc., § 335.1; 3 Witkin Cal. Proc. (5th ed. 2008) Actions, § 553, p. 703.) And the statute begins to run on the last overt act. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 787.) But that act was, as Cynthia herself states, in 2008. Her SAP filed almost five years later was barred.

In addition to all that, we fail to see what Cynthia could do if she were given leave to amend. We have noted above the numerous proceedings that have occurred between and among the Marcotte family beginning in late 2008. Cynthia's brief represents that "*six cases* [have] been filed, with petitions and amended pleadings filed by Mark, Paul, Barbara, Robin and Cynthia in various capacities, in two courts, as well as numerous objections, oppositions, replies, declarations, motions and demurrers filed by each party together with voluminous exhibits and judicial notice requests concerning the other pending actions." Whether there have been six cases or, as we count them, more than six, there have been many.

The conservatorship proceeding by itself has created a 22-volume record, comprising over 13,000 pages. It has involved no fewer than eight judicial officers, and over 30 court appearances. To quote one judge quoting another, it is the largest conservatorship "in the history of Contra Costa County." According to Cynthia, the litigation has generated $4 million in attorney fees. Judge Fenstermacher made a ruling that put an end to all that, and entered judgment dismissing Cynthia's claims. We find no error.

**DISPOSITION**

The judgment is affirmed. Mark and Paul shall recover their costs on appeal.

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Richman, Acting P.J.

We concur:

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Stewart, J.

_____
Miller, J.

A143746; *Anderson v. Marcotte, et al.*